TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~641~~ 375 781

THE UNITED STATES OF AMERICA, PLAINTIFFS,

vs.

GEORGE COOK, DEFENDANT.

ON CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED APRIL 2, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 641.

THE UNITED STATES OF AMERICA, PLAINTIFFS,

vs.

GEORGE COOK, DEFENDANT.

ON CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss :

At a stated term of the circuit court of the United States of America, for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday, (being the second day) of October, A. D. 1871—present and presiding, the Honorable David Davis, associate justice of the Supreme Court of the United States, assigned to this circuit, and the Honorable Andrew G. Miller, district judge—among other, the following procedings were had, to wit:

THE UNITED STATES OF AMERICA
vs.
GEORGE COOK. } At law.

Be it remembered that, heretofore, to wit, on the 18th day of February, A. D. 1870, came the district attorney, Mr. Hazelton, and filed his præcipe for a writ of replevin, as follows :

Præcipe for writ af replevin.

The United States circuit court, district of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
GEORGE COOK.

To the CLERK:

Issue a writ of replevin in the above-entitled action, agreeably to the affidavit herewith filed, and deliver the same to the United States marshal for service.

Feb'y 18, 1870.

G. W. HAZELTON,
U. S. Att'y, Dist Wis.

And also filed an affidavit, as follows, to wit :

2 *Affidavit for writ of replevin.*

THE UNITED STATES OF AMERICA
vs.
GEORGE COOK. } Replevin.

UNITED STATES OF AMERICA,
District of Wisconsin :

John A. Manley, of lawful age, being duly sworn, says that he is the United States Indian agent for the Green Bay agency, and that, as such agent, he is charged with the prosecution of trespass on the lands called the Indian reservation, & he further says that the United States of America are lawfully entitled to the possession of and are the lawful owner of four hundred thousand feet of pine logs lately cut on the Oneida reservation, so-called, of great value, to wit, sixteen hundred

dollars; that the said logs are wrongfully detained by George Cook at and in the State and district of Wisconsin; that the alleged cause of such detention thereof, according to the best knowledge & belief of this affiant, is that said defendant purchased said logs of the Stockbridge Indians.

And this affiant further says that the said logs have not been taken for a tax assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the United States, and that the actual value of said logs is sixteen hundred dollars.

JOHN A. MANLEY,
U. S. Ind. Agent.

Subscribed & sworn to before me this 18th day of Feb'y, 1870.
EDW. KURTZ, *Clerk.*

Whereupon a writ of replevin issued, as follows:

3 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

[SEAL.] The President of the United States of America to the marshal of the district of Wisconsin, greeting:

Whereas The United States of America complains that George Cook does unjustly detain from them four hundred thousand feet of pine logs lately cut on the Oneida reservation, so-called; therefore you are hereby commanded that you cause the same goods and chattels to be replevied and delivered to the said The United States of America without delay; and also that you summon the said George Cook to appear before the judges of the circuit court of the United States of America for the district of Wisconsin, at Milwaukee, on the first Monday of April, next ensuing, if to be found in your district, to answer the said The United States of America in the premises.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district of Wisconsin, this 18th day of February, in the year of our Lord one thousand eight hundred and seventy and of the Independence of the United States the ninety-ninth.

EDWARD KURTZ, *Clerk.*

G. W. HAZELTON,
U. S. Dist. Attorney.

Return to writ.

Writ returned with the marshal's return endorsed thereon, as follows, to wit:

"By virtue of this writ & by direction of the U. S. dist. att'y, I replevied the within-described property, consisting of about four hundred thousand (400,000) feet of pine logs marked (S) on the end with a black-lead pencil, & I delivered the same to W. R. Bourne, Indian agent for the Green Bay agency; & I served this writ on the within-named George Cook, by showing him the same & delivering to him personally a copy thereof with a copy of the affidavit thereto annexed, this 21st day of February, 1870.

C. S. HAMILTON, *Marshal.*
By DANIEL M. WHITNEY,
Deputy.

Fees $12.68.

I further return that, by virtue of the annexed bond, I released the above mentioned property to the within-named George Cook.

C. S. HAMILTON, *Marshal.*
By DANIEL M. WHITNEY,
Deputy.

And which bond referred to in above return is as follows, to wit:

5 *Bond for delivery of property.*

Know all men by these presents that we, George Cook, as principal, and N. C. Foster, of F't Howard, and H. E. Brown, of Green Bay, as sureties, are held & firmly bound unto the United States of America, in the sum of three thousand two hundred dollars, to be paid to the United States; to which payment, well & truly to be made, we bind ourselves, our heirs, executors & administrators, firmly by these presents, sealed with our seals, & dated this 23d day of March, eighteen hundred seventy.

Whereas the United States have sued out a writ of replevin in the circuit court of the United States, for the district of Wisconsin, against the above-bounden George Cook, by virtue whereof, & of an affidavit & direction in the same suit, the marshal of the United States for the said district, has taken from the said Cook four hundred thousand feet of pine logs, stated in said affidavit to be of the value of sixteen hundred dollars; and whereas the said Cook desires to have a return of the said property:

Now, therefore, the condition of this obligation is such, that if the said George Cook, defendant in the said suit, shall deliver the said property to the said marshal, if such delivery shall be adjudged, and shall pay to the United States such sum as may, for any cause, be re-
6 covered against the said George Cook in the said action, then this obligation shall be void; otherwise of force.

GEO. R. COOK.
N. C. FOSTER.
H. E. BROWN.

In presence of—
W. H. NORRIS, Jr.

DISTRICT OF WISCONSIN, *ss:*

N. C. Foster and Henry E. Brown, being duly sworn, do say, each for himself, that he is one of the sureties above-named, and is a resident and freeholder within said district; and that he is worth the sum of sixteen hundred dollars, exclusive of property exempt from execution.

N. C. FOSTER.
H. E. BROWN.

Subscribed & sworn to this 23d day of March, A. D. 1870, before me.
[SEAL.] A. W. KIMBALL,
Notary Public.

March 23, 1870. This day came the district attorney, and filed his declaration, as follows:

Declaration.

In circuit court of the first Monday of April, 1870.

THE UNITED STATES OF AMERICA,
District of Wisconsin:

THE UNITED STATES OF AMERICA
vs.
GEORGE COOK.

The United States of America, the plaintiffs in this suit, by G.
7 W. Hazelton, their attorney, come and complain of George Cook, the defendant in this suit, by a plea, wherefore they took four hundred thousand feet of pine logs of the said plaintiff, and unjustly detained the same against sureties and pledges until, &c., and thereupon the said plaintiffs, by their said attorney, complains: For that the said defendant, heretofore, to wit, on the 15th day of February, 1870, at the district of Wisconsin aforesaid, took the aforesaid goods and chattels, to wit, the pine logs aforesaid, of great value, to wit, of the value of sixteen hundred dollars, and unjustly detained, and still detains the same against sureties and pledges, until, &c. Wherefore the plaintiffs say that they are injured, and have sustained damages to the amount of sixteen hundred dollars, and therefore they bring suit, &c.

By G. W. HAZELTON,
U. S. Att'y, Dist. Wis.

APRIL 11, 1870.

This day came the defendant, by his attorneys, Messrs. Smith & Stark, and filed his pleas, as follows:

Pleas.

Circuit court of the United States for the district of Wisconsin.

GEORGE COOK
ads.
UNITED STATES OF AMERICA.

And the said George Cook, defendant in this suit, by Smith & Stark, his attorneys, comes & defends the wrong & injury, when, &c., & says that he doth not detain the goods & chattels in the said declaration mentioned, or any part of them, in manner & form as the plaintiff hath above thereof complained against him; and of this he puts himself upon the country.

And said plaintiff doth like, &c.

And, for a further plea, the said defendant, by leave of the court, says that the plaintiff ought not to have or maintain its aforesaid action thereof against him, because he says that the said goods & chattels, at the said time when, &c., were the property of said defendant, & not of the said plaintiff, as by the said declaration, is above supposed; and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him; & he also prays a return of the said goods & chattels, together with his costs in this behalf to be adjudged to him, &c.

SMITH & STARK, *Def'ts' Att'ys.*

MAY 11, 1870.

This day came the district attorney, and filed his replication to the defendant's second plea, as follows:

9 *Replication.*

United States circuit court, district of Wisconsin.

THE UNITED STATES *vs.* GEORGE COOK. } Replevin.

And the said plaintiffs, for replication to the plea of the said defendant by him secondly above-pleaded, say that they ought not to be barred from having and maintaining their aforesaid action, because they say that the said goods and chattels, at the said time, when, &c., were not the property of the said defendant, but that the said goods and chattels were then and there the property of the said plaintiff; and this the plaintiffs pray may be inquired of by the country, &c.

G. W. HAZELTON,
U. S. Att'y, Dist. Wis.

JULY 7, 1871.

This day came the defendant, by his counsel, and on his application, and cause shown, it is ordered by the court that this cause be, and hereby is, continued.

And now at this same term, to wit, October term, 1871, and on the third day thereof, to wit, on the fourth day of October, A. D. 1871—present the Hon. David Davis, associate justice of the Supreme Court of the United States, assigned to this circuit, presiding, and the Hon. Andrew G. Miller, district judge—the following proceedings were had, to wit:

10 *Trial.*

THE UNITED STATES OF AMERICA *vs.* GEORGE COOK. } At law.

This day came the district attorney, and the defendant by his counsel, and the issues herein came on to be tried.

Whereupon a jury was called to try the same who came, to wit: Charles D. Gage, Jean A. Lebeau, Alexander Spence, Alexander G. Gibbon, Nathan R. Allen, John Larsen, Asher Armstrong, Nathaniel Merrill, Edwin Upson, H. D. Morse, John Campbell, and Nelson Palmer, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled; and the trial not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the fourth day of said term, to wit, on the 5th day of October, A. D. 1871, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA *vs.* GEORGE COOK. } At law.

This day came the district attorney, and the defendant, by his counsel, and the trial of the issues herein was resumed; and the jurors of the

jury aforesaid being charged by the court on their said oaths, respectively, do say that the property, goods, and chattels described in
11 the declaration, to wit, one hundred and fifty thousand feet of pine logs, is the property of the United States, plaintiff, and not the property of the said defendant, George Cook, and do find the value thereof to be seventy-five dollars, and assess the damages for the detention thereof at six cents. By consent, this verdict being subject to a division of opinion between the judges as to the right of the United States to maintain this action, certified to the Supreme Court of the United States.

Said certificate of division of opinion is as follows:

Certificate of division of opinion.

Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA
vs.
GEORGE COOK.

This is an action of replevin brought by the United States against the defendant to recover the possession of certain saw-logs of pine, claimed in the declaratiou to be unlawfully detained by him.

The defendant, by his pleas, denied that the logs were the property of the United States or were unlawfully detained by him, and alleged that they were his property.

Upon the trial, before the jury, the Honorable David Davis, circuit judge, and the Honorable Andrew G. Miller, district judge, pre-
12 siding at the October term of the circuit court, at Milwaukee, on the fifth day of October, 1871, it appeared, by the plaintiffs' proofs and by the admission of defendant's counsel that a portion of the logs mentioned in the declaration, to wit, 150,000 feet, board measure, of the value of seventy-five dollars, were cut by a small number of Indians of the Oneida tribe (being of the First Christian and Orchard parties named in the treaty of February 3, 1838,) upon lands occupied by that nation, and reserved to them under the second article of that treaty, which logs were subsequently hauled off the reservation by such Indians and sold at their full value to the defendant, who occupied and run a saw-mill near the line of the reservation.

Evidence was introduced by the defendant tending to show that timber on that reservation had been cut and sold by Indians of the tribe continually since the year 1838, by tacit consent of some officers of the tribe.

It also appeared by the evidence that the Indians residing on this reservation under the above-mentioned treaty are some twelve hundred in number; that they have an annuity from the United States of about eight hundred dollars a year in all; that the reservation contains about sixty-five thousand acres; that a part of this (some three
13 or four thousand acres) is occupied and cultivated as farming lands by individuals of the tribe, in severalty, by the consent of the tribe; that many of the Indians, including most of the younger men, do not cultivate any of the lands as their own; and that the pine-logs in question were not cut on that part of the reservation cultivated or occupied in severalty.

The cause having been submitted by the parties upon the foregoing facts, the counsel for the United States asked the court to instruct the jury that the United States were entitled to bring and maintain this action for the said timber. Upon the question of giving which instruction the opinions of the said judges were opposed.

Whereupon, on motion of the district attorney of the United States that the point upon which the said disagreement has happened may, during the same term, be stated under the direction of the judges and certified under the seal of the court, to the Supreme Court at the next session, to be by that court finally decided, it is ordered that the foregoing state of the pleadings and statement of facts which is made under the direction of the said judges be certified according to the request of the counsel of the plaintiff, and to the statute in such case provided.

14 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss :

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of The United State' vs. George Cook, No. 29, law-docket C.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said eastern district of Wisconsin, this 29th day of March, in the year of our Lord one thousand eight hundred and seventy-two, and of the independence of the said United States the ninety-sixth.

[SEAL.] EDWARD KURTZ, *Clerk.*

(Indorsement on cover :) No. 641. The United States, plaintiffs vs. George Cook. Certificate of division. E. Wisconsin C. C. U. S. Filed 2d April, 1872.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, *Plaintiffs*,
vs.
GEORGE COOK.
} No. 161.

On Certificate of Division of Opinion between the Judges of the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, *Plaintiffs*,
vs.
GEORGE COOK. } No. 161.

On Certificate of Division of Opinion between the Judges of the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR THE UNITED STATES.

"This is an action of replevin brought by the United States against the defendant to recover the possession of certain saw-logs of pine, claimed in the declaration to be unlawfully detained by him.

"The defendant, by his pleas, denied that the logs were the property of the United States, or were unlawfully detained by him, and alleged that they were his property.

"Upon the trial, before the jury, the Honorable David Davis, circuit judge, and the Honorable Andrew G. Miller, district judge, presiding at the October term of the circuit court at Milwaukee, on the fifth day of October, 1871, it appeared, by the plaintiffs' proofs and by the admission of defendant's counsel, that a portion of the logs mentioned in the declaration, to wit, 150,000

7 Stat. 566

feet, board measure, of the value of seventy-five dollars, were cut by a small number of Indians of the Oneida tribe, (being of the First Christian and Orchard parties named in the treaty of February 3, 1838,) upon lands occupied by that nation and reserved to them under the second article of that treaty, which logs were subsequently hauled off the reservation by such Indians and sold at their full value to the defendant, who occupied and run a saw-mill near the line of the reservation.

"Evidence was introduced by the defendant tending to show that timber on that reservation had been cut and sold by Indians of the tribe, continually since the year 1838, by tacit consent of some officers of the tribe.

"It also appeared by the evidence that the Indians residing on this reservation, under the above-mentioned treaty, are some twelve hundred in number; that they have an annuity from the United States of about eight hundred dollars a year in all; that the reservation contains about sixty-five thousand acres; that a part of this (some three or four thousand acres) is occupied and cultivated as farming land by individuals of the tribe, in severalty, by the consent of the tribe; that many of the Indians, including most of the younger men, do not cultivate any of the lands as their own; and that the pine logs in question were not cut on that part of the reservation cultivated or occupied in severalty.

"The cause having been submitted by the parties upon the foregoing facts, the counsel for the United States asked the court to instruct the jury that the

United States were entitled to bring and maintain this action for the said timber. Upon the question of giving which instruction, the opinions of the said judges were opposed.

"Whereupon, on motion of the district attorney of the United States that the point upon which the said disagreement has happened may, during the same term, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court at the next session, to be by that court finally decided, it is ordered, that the foregoing state of the pleadings and statement of facts which is made under the direction of the said judges, be certified according to the request of the counsel of the plaintiff, and to the statute in such case provided." (Record, pp. 6, 7.)

The question is: Can the United States maintain replevin for "saw-logs" cut by individual Indians from a reservation, and by them hauled off and sold at full value to the defendant?

The land from which the trees were cut was not "cultivated or occupied in severalty." It was, therefore, in its original condition as Indian land. The Indians who cut the trees were tribal Indians, who had not taken, or manifested an intention to take, any of those steps which our laws recognize as steps in civilization.

The relation occupied by the United States to Indians in their original condition is compounded of two elements: 1. The ultimate title to the Indian lands is

in the United States; and, 2. The Indians are personally in a pupillary condition.

1. The United States recognize in Indians a right of occupancy only—occupancy *qua* Indians, that right being vested in *the tribe*, and not in *individuals*.

It is true that, by treaties or otherwise, upon an appearance of a desire upon their part to become civilized, the Executive is authorized to confer rights to lands upon members of tribes, in *severalty*, and that in such lands their rights may be more than of mere occupancy. But here the land is Indian land under its original character. As regards such land, we submit that it is not competent for Indians of their own head to act as if it had been assigned by the Executive in severalty, and so to appropriate it to some of the uses to which woodland is applied by civilized people. In regard to such land the United States has ultimate rights, and those of Indians are merely of occupancy and use after the manner that the original Indians used and occupied it.

Under our system of legislation it is exclusively an Executive function to detect and recognize among Indians such appearances of civilization as promise valuable results, and deserve to be cultivated, protected, and rewarded. In the absence of action to that effect by the Executive, the judiciary, as we submit, cannot recognize as legitimate any other use of Indian lands by Indians, than occupancy and use *qua* Indians—a species of use which requires of us no definition for the purposes of this case other than it does not extend to the commission of what is known as

waste; it does not extend to such destruction as will render lands thereafter less useful for the purposes of civilization, either to these Indians in an improved condition, or to some other race. It seems, therefore, that they cannot dispose of the products of mines, quarries, or forests.

2. This grows in part, also, out of the personal relation borne by the Government to tribal Indians as their *tutor*. Such Indians want legal discretion. The whole body of our statute law upon this topic recognizes this fact. Our Government, which is *republican* as to other races, is *parental* as to tribal Indians. Congress watches, regulates, and restrains, at almost every point, ~~their~~ intercourse and dealing with the civilized inhabitants of the country. It does so for the good of the Indians, and with no sense of responsibility other than what is usual to parents—that is, *moral* responsibility. It is under no *legal* responsibility to the Indians for what it does.

We conclude that tribal Indians have no power to sell "saw-logs" cut from their reservations.

As standing timber, this wood belonged to the United States, subject to the Indian interest in it as a covert for game, and subject also, perhaps, to the right of the tribe, *as a tribe*, to order land to be cleared when necessary for agriculture. After the wood is cut down, (except perhaps as above,) it of course remains the property of the United States, and may be recovered by the ordinary actions appropriate in such cases.

There was a time in Europe when the doctrines of lord and tenant, as known in the feudal system, were

legitimate. These doctrines became, and remain, odious, because retained and enforced, when the lapse of time had changed all. The relation of the United States to Indians is, in some features, not unlike it. Amongst other remedies for waste in timber, the landlord could sue for the trees after they were cut down, in their new condition as personal property,—the interest of the lessee determining the instant they were cut down. 3 Steph., N. P., 2670, and cases cited; also, *ibid.*, 2485.

It may be proper to admit, that the only case upon this point that we have met with, does not support our views, although it does not appear there that the timber was not cut down by order of the tribe. Ogden *vs.* Lee, ~~5 Dana,~~ 546. We also refer to Wheeler *vs.* Meshingomesia, 30 Ind. R., 402.

6 Wheat (U.S.) & 5 Dana 628 See U.S. vs Forden & Briscoe 397.

GEO. H. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor General.

Mr Hubbell, U.S. Atty. for Wisconsin, suggests that the difficulty below may be the power of the U.S. to bring a suit unless where authorized by a Statute; see Cotton v U.S. 11 How. 229 & U.S. v Fuqua 5 Pet. 115.

Johnson & Graham & Wheaton

No 161

March 31

Judge Davis

SUPREME COURT

OF THE UNITED STATES.

UNITED STATES,

vs.

GEORGE COOK.

No. 161, October Term 1873.

DEFENDANT'S BRIEF AND ARGUMENT.

WINFIELD SMITH,
Of Counsel for the Defendant.

SMITH & STARK,
Defendants Attorney.

J. H. Yewdale & Sons, Law Printers, Milwaukee.

SUPREME COURT
OF THE UNITED STATES.

UNITED STATES,

vs.

GEORGE COOK.

No. 161, October Term, 1873.

On certificate of division of opinion between the Judges of the Circuit Court for the Eastern District of Wisconsin.

BRIEF FOR THE DEFENDANT.

This action is replevin by the United States for logs cut by Indians of the Oneida tribe on their reservation near Green Bay, Wisconsin, and sold by them to the defendant for full value.

The Indians are of the First Christian and Orchard parties, who are named in the treaty of February 3d, 1838. There are about twelve hundred of these Indians and they reside on this reservation, of which there are about 65,000 acres in all. Some of them cultivate a part of this land (some 3000 or 4000 acres), but many of the Indians do not cultivate any land. The logs in question were not cut upon the portion of the reservation which is cultivated. The Indians have an an-

nuity from the United States, which amounts to about $800 a year in whole. Ever since 1838, they have cut and sold timber from this land without objection.

The question on the record is whether the United States can maintain this action upon the foregoing facts.

ARGUMENT FOR DEFENDANT.

The facts do not show title in the plaintiff. The Indians through whom the defendant claims the logs, possessed the land from which they were cut, and the logs after they were cut. Tne United States never had possession.

We think it quite clear that the United States have no right of present possession, without which the action would not be maintained. The right of possession was in the Indians. The logs in question being cut on the land reserved to the Indians, are rightfully in their possession, unless the United States have a title to the fee of the land, and the Indians have only such tenure that the severance of the timber vests the title thereto in the owner of the fee. Two things must concur: First, that the United States have actual ownership. Second, that the Indian tenure is of such character that cutting timber forfeits their right of possession, at least as to the timber cut. The latter of these propositions can by no means be maintained. We think the former also unfounded.

The Indian title to the land in question has never been extinguished.

By article 2 of the treaty referred to in the record, made February 3d, 1838, with the First Christian and Orchard parties of Indians (7 Statutes at Large, p. 566), the land on which this timber was cut, is expressly reserved to those Indians, "*to be held as other Indian lands are held.*"

By article 1, the Indians cede to the United States the land previously held by them, except the reservation mentioned in article 2.

These Indians derived this title from the Menominee Indians, with the assent of the United States, as appears from the two treaties cited in article 1.

The first treaty, made February 8th, 1831, between the United States and the Menominees (7 Statutes at Large, p. 342), defined the boundaries of the country of the Menominees (including the reservation on which this timber was cut). This country is claimed by the the Menominees "as the exclusive property of their tribe." Article 1. In the same article the Indians agree that a part of their lands, (including this "Oneida reservation,") may "be set apart as a home to the New York Indians." "It is distinctly understood," the article further declares, that the lands hereby ceded to the United States for the New York Indians, are to be held by those tribes under such tenure as the Menominee Indians now hold their lands, subject to such regulations and alterations of tenure as Congress and the President shall from time to time think proper to adopt." It may be added here that no regulations have been made by Congress which affect the questions here arising.

The treaty of October 27th, 1832 (7 Statutes, 405), varies the boundaries of the land reserved to the New York Indians, but without affecting the question here presented.

A treaty made with the New York Indians, January 15th, 1838, (7 Statutes, 550), recognizes in article 1 the Indian title to this reservation.

The nature of the Indian title has been heretofore considered by this Court.

In Fletcher v. Peck, 6 Cranch, 87, it is declared (p. 140), that the Indian title "*is certainly to be respected by all courts*," until it be legitimately extinguished."

In Johnson & Grahams' lessee v. McIntosh, 8 Wheaton, 543, Chief Justice Marshall says of the Indians, in discussing their relations to the European discoverer (p. 574:) "They were admitted to be the rightful occupants of the soil, with a *legal*, as well as just claim, to retain

possession of it, *and to use it according to their own discretion.*" In summing up his views, while holding that the Indians could not convey to any individual perfect title in fee without the consent of the government, the Chief Justice said (p. 603): "It has never been contended that the Indian title amounted to nothing. *Their right of possession has never been questioned.* The claims of this government extend to the complete *ultimate title, charged with this right of possession*, and to the exclusive power of *acquiring* this right."

See the opinion of Chief Justice Marshall in Worcester, v. Georgia, 6 Peters, 515, on page 544. "This principle, acknowledged by all Europeans, gave to the nation making the discovery, * * * * * * the exclusive right to purchase, but did not found that right on the denial of the right of the possessor to sell." See Judge Washington's opinion, page 579 to 582, inclusive.

And see the case of Cherokee Nation v. Georgia, 5 Peters 1, 48.

As Judge Kent says (1 Com. 257): "Congress has the exclusive *right of pre-emption* to all Indian lands lying within the territories of the United States." He adds that the Indians have a right of occupancy, and the United States possess the legal title, subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy, either by conquest or purchase. "The principle is that the Indians are to be considered merely as occupants, to be protected while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to any other than the sovereign of the country."

All treaties, statutes, and practice of the Government from its organization down, are in harmony with this principle. The Government claims the right of pre-emption, when the Indians desire to sell their land, but has never claimed the right to interfere with the occupation or the use of it, until the Indians sell.

The manner of use is at the discretion of the Indians. Whether they will hunt and fish, or clear and cultivate it, is for themselves to decide. It is the well known policy of the government to lead them to the practice of the arts of civilization, and to teach them to so use the land as to obtain their support from a small surface by tilling it as the

white men, rather than to occupy a large extent in the sole pursuit of game. The treaties to which we have referred are significant to this point.

The treaty of 1831 (7 stat. 344) provides for "weaning the Indians from their wandering habits, by attaching them to comfortable homes," for teaching them the business of farming, for teaching the women housewifery, for supplying them with household articles, with horses, cows, hogs, sheep, farm ing utensils, and other articles of husbandry necessary to their comfort, for erecting a grist mill *and a saw mill*, for employing millers to instruct the Indians, and for erecting houses for the Indians and for their instructors.

The treaty of 1838, Article 15, makes briefly similar provisions, appropriating no less than $400,000 to aid in removing the Indians, supporting them for the first year, assisting them in education and learning to cultivate their lands; "in erecting mills and other necessary houses ; in purchasing domestic animals, and farming utensils, and acquiring a knowledge of the mechanic arts." The Oneidas are to have lands so laid off (Article 5) "as to secure them a sufficient quantity of timber for their use."

Other treaties and other legislation might be cited in abundance to show the policy and practice of this government in dealing with the Indians.

It is evident that cutting timber on the Indian lands is the first essential step to bring about the desired change in their habits. How could the lands be cleared and cultivated if the trees are not to be cut down? How could the mills and houses be erected without the timber ? How would the Indians learn to lead the life of the white man if they are not permitted to adopt his practices ? How can they raise grain and feed their cattle in the unbroken forest ? Many of these Indians make their living as farmers. Could they have done this, if the idea had prevailed which is at the bottom of this suit ? On the contrary, the record (fol. 12) shows that from the beginning of their occupancy they have been cutting and selling timber. No objection was ever made until now.

It is clear that the laws and treaties admit, and even guarantee the right of the Indians to use and dispose of the growing timber on their reservations.

There is another urgent and conclusive reason why the practice has not been, and should not be restrained. It is absolutely necessary to the support of the Indians. Most of them have no other means of subsistence. The annuity (fol. 12) from the government is about two-thirds of a dollar only for each individual. While some of the Indians have farms, the others have only this timber land. They are confined to this reservation, which furnishes in its present state only timber. The game remaining on this small reservation, surrounded by whites, would not avail even so much as the annuity. For food, clothing, for the materials to construct dwellings, for lumber, nails, glass, shingles, iron, for ploughs, harrows, horses, cattle, and other necessaries, they have but one article to give in exchange—the trees which cumber their land, and retard its cultivation. On what theory then should the lawful occupants be forbidden to cut them? And if allowed to cut them, why not to sell them? Why should this wealth furnished them by nature, and all they have, the only source of their hope to compete with the whites, and to acquire their knowledge, their habits, and their skill,—rot on the ground, or be wastefully burned to get it out of the way? Can the Indians learn or practice farming, except by removing the timber? They cannot live even for a year without the proceeds of that timber. I respectfully refer the Court to the remarks on this subject made by Judge Drummond, before whom we tried a case quite similar, but upon evidence more full in details that this record presents. (United States v. Foster, 2 Bissell's Reports, 377.)

In the courts of the state of New York, the question here presented has been fully considered and adjudicated.

In Ogden v. Lee, 6 Hill, 546, it appeared that the State of Massachusetts formerly owned in the *Cattaraugus reservation* the same rights now owned by the United States in the Oneida reservation. The plaintiff had succeeded to those rights, and brought trover for sawlogs cut on the land by the Indians who occupied it, and who sold the logs to the defendant. Judge Bronson discusses the question fully and the Supreme Court held without dissent that the action would not lie. He concludes: The Indians "have cut and sold *their own timber*, and I see no principle on which the plaintiff can have an

action either against them or their vendees." This case was *unanimously affirmed* in the court of Appeals. Fellows v. Lee, 5 Denio, 628.

In Strong v. Waterman, 11 Paige, 607, the Court of Chancery asserted the same doctrine, and while declaring "the ultimate fee of the land," to be in the state, chancellor Walworth held the right of the Indians "to the *beneficial* use and occupancy thereof," to be unquestionable. Upon bill of complaint filed by two Indians, on behalf of all, an injunction was maintained against the defendant, who had cut timber on their reservation, and an account was decreed against him for the damages sustained.

The views above set forth on behalf of the defendant herein are supported by the Supreme Court of Indiana, in Wheeler v. Me-shing-go-me-sia, 30 Indiana, 402. One suggestion of the Indiana court, so fitly meets a claim which may be made here, that the Government is injured by waste, that I cannot forbear to cite it. The complaint was for cutting timber on Indian land. The Court says: "It is by no means clear that the acts complained of amount to waste. * * * It was wild land. The doctrine of the common law as to waste could have no application to the members of the band. It was competent to change the forest into cultivated fields; to build houses on the land; to occupy and cultivate it in convenient portions; in short, to use it as a prudent farmer would do with his own land. The trees of our large forests are common articles of traffic. In the improvement and development of a new country, they are as much an article of trade as the annual crops."

But, may it please the Court, these Indians are not tenants, subject to impeachment of waste. They do not hold their lands nor the forests which grow there, by the grace of this Government. The Indians held their lands before this Government was. They took from them what they would. They used them as they would. They were the absolute, uncontrolled possessors. If they did not own the fee, it was because there was then no fee. They did not sell land, because there was no one to buy. No discovery, no immigration, no new institutions have abridged, nor have sought to abridge their rights. Least of all, has the Government of the United States asserted any claim in derogation of these rights. It has held itself out as acknowledging

and protecting them. It has with reason challenged the admiration of other nations for its honorable and just dealings with these, its predecessors. The noble words of its great Judges have by statutes, and treaties made deeds been. The executive and the legislative departments have even led the way in which the Courts have followed. The United States Government has only insisted for its safety that no other nation, no corporation, no individual should take from the Indians their right to the soil. The right of the native owners to what grows on the soil was never gainsayed, nor limited.

These suits stand without a precedent, as they stand without reason or law, for their support. We have never heard the faintest suggestion of a legal foundation for them. How, when, where, by what treaty, by what purchase, by what gift of God or man, did the Government obtain right to take this timber from these Indians? The Indians—Oneidas or Menominees—have lived under the shade of these trees, and of the trees from the cones of which these grew, hundreds of years ago, when as to white men, there were as yet none of them on all this continent. The Indians and their ancestors possessed this forest, as now they do, in the days when the memory of man runneth not to the contrary. Their prescription is far more ancient than the *parvenu* tenures of which we boast. We bow before claims so venerable, so indisputable. We must concede,—all Courts must respect—the title of these lords of the forest. We yield them all they hold, all they have ever demanded. When the covetous heart of the white nation is set upon their possessions, the nation buys. It pays a price, sometimes small, sometimes fair, sometimes liberal. It does not steal nor rob. Heretofore, it has always made a *purchase*. A solemn treaty has been deemed a necessary form.

Now, it would seem, *nous avous change tout cela*. The thing is to be done differently. There is a new invention. A better plan has been devised. An effectual plan, and particularly, a *legal* plan—a point much insisted upon by some good people. Some person in Wisconsin has contrived it. By the new method the Indian property is got;—not by purchase; not by theft; not by robbery. Better than these. By REPLEVIN.

It is a new use for a replevin suit. But if it works, there will be much following of this example. Perhaps the novelty commends it

more to the inventor, than to this Court. We can but believe, after all, that the humble functionary who seeks eminence, and would have attained notoriety by the success of these suits, may be disappointed. As the Executive has not authorized, so we presume the Judiciary will not approve these unexampled proceedings.

It is then evident that the Indians were acting within the spirit and the strict letter of their legal rights, while cutting the logs in question. That these products of their land belong to them until they sell the land; that the sale of the timber is necessary for their support, as the cutting was necessary to the cultivation of the land, that the title to the logs is in them and their vendees; that of a surety, the United States government has no present title to the logs in question, and therefore cannot maintain this action. We do not discuss the power of Congress to pass laws conflicting with the right of the Indians to use this timber. We do not now consider whether that practice or any other mode of starving the Indians on their reservations, would be wise or constitutional. It disposes of this case to say that no laws of that sort exist. These suits are as plainly in the face of the uniform policy of the law making power, and of the treaty making power, as of humanity and justice.

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